

Department of Planning, Building and Code Enforcement
1 North First Street, Room 400
San José, California 95110-1795

STAFF REPORT

Meeting Date/Agenda Number
P.C. 7/14/04 Item: 4.b.

File Number
CP04-046 & ABC04-004

Application Type
Conditional Use Permit

Council District
5

Planning Area
Alum Rock

Assessor's Parcel Number(s)
254-07-064

PROJECT DESCRIPTION

Completed by: Mike Mena

Location: Northeast corner of Jackson Avenue and McKee Road.

Gross Acreage: 9.5

Net Acreage: 9.5

Net Density: n/a

Existing Zoning: CG General Commercial

Existing Use: various commercial uses

Proposed Zoning: none

Proposed Use: Sale of alcoholic beverages for off-site consumption

GENERAL PLAN

Completed by: MM

Land Use/Transportation Diagram Designation
Neighborhood/Community Commercial

Project Conformance:
☒ Yes ☐ No
☐ See Analysis and Recommendations

SURROUNDING LAND USES AND ZONING

Completed by: MM

North: Single-Family Residential

R-1-8 Residence District

East: Commercial/Multi-Family Residential

General Commercial/ A(PD) Planned Development
Residence District

South: Various commercial uses

CO Commercial Office and CP Pedestrian
Commercial

West: Commercial/Multi-Family Residential

CP Pedestrian Commercial/ A(PD) Planned
Development Residence District

ENVIRONMENTAL STATUS

Completed by: MM

Environmental Impact Report found complete

☒ Exempt

PUBLIC AGENCY COMMENTS RECEIVED

Completed by: MM

Department of Public Works

None Received

Other Departments and Agencies

? Police Department (Vice Unit), dated July 2, 2004.

? City of San José Fire Department, dated May 20, 2004.

GENERAL CORRESPONDENCE

None received

ANALYSIS AND RECOMMENDATIONS

BACKGROUND

The applicant, Chavez Supermarket (Chavez Family LP), is requesting a Conditional Use Permit (CUP) to allow off-site sale of alcoholic beverages at an existing shopping center located at the northeast corner of Jackson Avenue and McKee Road. The applicant will be occupying a currently vacant retail space (formerly a fabric store) on the subject site. The Zoning Ordinance requires a CUP for off-sale of alcoholic beverages in the CG General Commercial Zoning District.

For off-sale of alcohol at this site, a Liquor License Exception is also required. Per the State Business and Professions (B&P) Code, Section 23958, the State Department of Alcoholic Beverage Control (ABC) shall deny an application for an ABC license if the issuance would either tend to create a law enforcement problem, or would result in or add to an undue concentration of ABC licenses in the area. Therefore, a location in the City could be considered “unduly concentrated” due to crime statistics and policing issues and/or the proposed site’s proximity to existing facilities with ABC licenses. In 1997, the San José City Council adopted a Resolution (No. 67681) identifying 24 Census Tracts as “unduly concentrated” for the purposes of this B & P Code regulation, and directed that no new retail ABC licenses be issued unless the City grants an Exception for “public convenience and necessity”, and that only full-service grocery stores be eligible for an Exception within these specific census tracts.

The proposed establishment is in Census Tract 5037 08 (part of former Tract 5037 04). The former

The subject premises are located within an existing shopping center consisting of a bakery, cleaners, the McKee Oriental Food Market, a mini-mart, Kohl's Department Store (under construction) and other commercial uses. Other nearby development includes single-family residences to the north, multi-family residences and commercial to the east, commercial uses across McKee Road to the south, and various commercial uses to the west of the site.

Project Description

Under this permit, the off-site sale of alcoholic beverages would be a new use allowed only for the subject grocery store and not for other tenants within the surrounding retail center without existing ABC permits. No additional building square footage may be constructed as part of this project, and no extended hours of operation are included in this proposal.

ENVIRONMENTAL REVIEW

The Director of Planning has determined that this project is exempt from environmental review under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act in that the use is to locate in an existing building/facility and no new construction or expansion is proposed.

GENERAL PLAN CONFORMANCE

The proposed commercial use, including the sale of alcohol, is consistent with the San José 2020 General Plan Land Use/Transportation Diagram designation of Neighborhood/Community Commercial. The site is currently developed with a commercial shopping center which has been sited to be compatible with existing and nearby residences.

ANALYSIS

The key issues analyzed for the proposed project fall into two categories. First is the consideration is whether the project is in conformance with the applicable sections of Title 20, the Zoning Code, related to off-sale of alcoholic beverages, and neighborhood compatibility of the use at this location. Second is review of the conformance of the proposed use with regard to applicable findings necessary for approval of the required Liquor License Exception. These issues are discussed in detail below.

center consisting of various commercial uses of which two uses currently provide off-sale of alcoholic beverages. Additionally, there are two restaurants on site, which have licenses for on-site sale of alcoholic beverages only. Planning staff has determined that allowing an additional facility to sell alcohol for consumption off-site as an ancillary use to a full-service grocery store would not contribute to an excess concentration of such establishments in the area and would not have an adverse effect on the nearby residential uses.

2. *For such a use at a location closer than 500 feet from any child care center, elementary school, secondary school, college or university, or one hundred fifty (150) feet from any residentially zoned property that the building in which the proposed use is to be located is situated and oriented in such a manner that would not adversely affect such residential and/or school use.* The project site is located within 150 feet of residentially zoned property; however, the walking distance from the store entry to the nearest residence is in excess of 600 feet. Additionally, the existing commercial development was designed in a manner that does not orient public entryways towards the adjacent residential properties and the proposed location/site is not directly accessible by such properties. In addition, the proposed grocery store is part of a larger commercial site with a major commercial tenant (Kohl's) which will provide a high level of activity on the site which will minimize loitering concerns sometimes associated with smaller stand alone stores.

Planning staff believes that the relevant findings above can be made for this full-service grocery store, and therefore, recommends that the Planning Commission approve the Conditional Use Permit subject to making the required finding for a Liquor License Exception required for the project as discussed below.

Liquor License Exception

In January 1995 the California State Legislature passed AB 2897 (Caldera legislation) which prohibits new retail alcoholic beverage licenses in an area of over-concentration, as defined by the Business and Professions (B&P) Code Section 23958.4(a)(3) and B&P Code Section 23958.4(a)(1). A memorandum from the Police Department (attached) has indicated that the proposed use would be located in an area in which reported index crimes and arrests for the Police Beat M1, in which this site is located, are more than 20% above the citywide average. Thus, this location is considered "unduly concentrated" per Section 23958.4(a)(1) of the Business and Professions Code and requires a Liquor License Exception be granted in order for ABC to have the potential to issue a ABC license.

The applicant has applied for the required Liquor License Exception concurrently with the CUP

site was previously identified as being in one of the 24 “unduly concentrated” census tracts. Because of this and the location’s above average police statistics, a Liquor License Exception is required.

The Planning Commission may grant the Liquor License Exception in conjunction with the Condition Use Permit, if the following findings can be made:

1. *The premises are not located in an existing Project Crackdown /Weed and Seed Area or similar areas that qualify for these programs pursuant to the City’s Neighborhood Revitalization Strategy.* Police Department staff have determined that the subject site is not located in a Project Crackdown, Weed and Seed area, or an Strong Neighborhood Initiative (SNI) area, and that the census tract in which the site is located is not currently “unduly concentrated” with off-sale ABC licenses, although it is in an area original identified as one of 24 census tracks with “undue concentration” by City Council Resolution. Although the proposal is located in an area with an above average rate of reported index crimes, the Police Department memorandum notes that there have been just 4 police contacts since June 2003, and that the Department does not object to the issuance of the Exception. In addition, staff believes that the renovation of a large portion of the site occurring through the Kohl’s project will have a beneficial impact in the vicinity and that sale of alcohol at this full-service grocery store will not generate additional law enforcement problems.
2. *The premises are not located within 500 feet of any public or private school. The closest public and/or private school (Independence High School) is located in excess of 500 feet northwesterly of the proposed use.* Although the use is located within 150 feet of a residentially zoned property, as stated previously, the site is designed in a manner in which the entrances to the site and proposed grocery store are not oriented towards the adjacent residences. The site is not directly accessible by the adjacent residential properties, with the walking distance from the entrance to the nearest residence in excess of 600 feet. Therefore, staff has determined that the proposed use would not be detrimental to adjoining residential areas, and is an appropriate addition to this larger commercial site.
3. *The use would not pose a detriment to the immediate neighborhood or continue current law enforcement problems.* While the Police memorandum does express some concern regarding the overall crime level for this Police Beat, there were only 4 Police contacts within the last year in this particular shopping center, and the Police Department has stated it has no objection to the granting of the Exception for this facility.

Conclusion

The off-sale of alcohol is not expected to prove detrimental to the neighborhood, and the proposed project would provide a convenient outlet for public purchase of groceries and other necessities along with the incidental sale of alcoholic beverages. Staff has included a condition limiting the staff area within the store which can be used for alcohol sales to help insure it remains an ancillary use. The existing building in which the proposed use is to be located is sited such that the use would not adversely affect the nearby residential developments.

PUBLIC OUTREACH

A notice of the public hearing was distributed to the owners and tenants of all properties located within 500 feet of the project site. Staff has been available to discuss the proposal with members of the public. Staff has received an inquiry regarding the proposed use on this site in the context of similar grocery store/retail uses on the site or in close proximity. The issue raised were primarily concerned with a second grocery store on the site, rather than specifically the off-sale of alcoholic beverages. A grocery/retail use is permitted by right in the CG General Commercial Zoning District.

RECOMMENDATION

The Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and include the following findings and conditions in its Resolution.

The Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. The project site is located on the northeast corner of Jackson Avenue and McKee Road (2327 McKee Road)
2. The site has a designation of Neighborhood/Community Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
3. The project site is located in the CG General Commercial Zoning District.
4. Under the provisions of Section 15301 of the State Guidelines for Implementation of the California Environmental Quality Act (CEQA) this project is exempt from the environmental

8. A Conditional Use Permit may be issued for the off-sale of alcoholic beverages if the Planning Commission makes the findings required by San José Municipal Code Sections 20.08.900 and 20.100.720.
9. A Liquor License Exception is required as the Police Department and CA Department of Alcoholic Beverage Control have determined that the issuance of an additional liquor license in this census tract would add a new license to this “unduly” concentrated census tract’s per the applicable State Code sections, based on the above average crime index in the Police Beat.
10. The building in which the proposed use is to be located is situated and oriented in such a manner that it would not adversely affect the nearby residential uses.
11. The project site is located within Census Tract 5037.08.
14. The Police Department indicates that granting this Conditional Use Permit would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.
15. The premises are not located within 500 feet of any public or private school.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project is consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.
4. The proposed location of the off-sale alcohol use would not contribute to an excess concentration of establishments in that it would not pose a detriment to the immediate neighborhood and would not generate additional law enforcement problems.
5. The project is consistent with the criteria for approval of a Liquor License Exception Permit and serves public convenience or necessity.

and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and

3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
 - b. By other public or private service facilities as are required.
4. The subject site is not located in an existing Project Crackdown/Weed and Seed Area, Project Crackdown Area, or Strong Neighborhoods Initiative (SNI) Area or similar areas that qualify for these programs on the City's Neighborhood Revitalization Strategy Criteria.
5. The proposed use is not located within 500 feet of any public or private school.
6. The proposed off-sale alcohol use would not pose a detriment to the immediate neighborhood or continue current law enforcement problems.

In accordance with the findings set forth above, a Conditional Use Permit and a Liquor License Exception to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS PRECEDENT

This Conditional Use Permit and Liquor License Exception Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be **signed, notarized, and returned** to the Department of City Planning within **60**

1. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region. Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.
2. **No New Construction.** No additional construction or development is approved under this permit.
3. **Nuisance.** This use shall be operated in a manner which does not create a public or private nuisance. Any such nuisance must be abated immediately upon notice by the City.
4. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 48 hours of defacement.
5. **Refuse.** All trash areas shall be effectively screened from view and covered and maintained in an orderly state to prevent water from entering into the garbage container. No outdoor storage is allowed/permitted unless designated on the approved plan set. Trash areas shall be maintained in a manner to discourage illegal dumping.
6. **Off-Sale of Alcoholic Beverages.** This permit allows for the sale of alcoholic beverages for off-site consumption only as an ancillary use to the full service grocery store.
7. **Limitations on Area of Alcohol Sales.** The sale of alcohol is intended to be incidental to the primary use of grocery sales. The area of alcohol sales shall not exceed 15 percent of the total shelf space and product display area within the retail store. No alcohol product display or storage shall occur outside of the retail tenant space.
8. **Building Permits.** This permit does not allow the conceptual floor plan contained in the Conditional Use Permit plans entitled "Chevron Supermarket, McKee Road, San José, CA," dated May 17, 2004.

11. **Compliance With Local and State Laws.** The subject use shall be conducted in full compliance with all local and state laws. No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code. The Permit shall be subject to revocation if the subject use is conducted in such a manner as to cause a nuisance, as defined above.
12. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to approval by the Director of Planning.

CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Conditional Use Permit/Liquor License Exception shall automatically expire two years from and after the date of adoption of the Resolution by the Planning Commission, or by the City Council on appeal, granting this Permit, if within such two-year period, the proposed use of this site has not commenced, pursuant to and in accordance with the provisions of this Conditional Use Permit/Liquor License Exception Permit. The date of adoption is the date the Resolution granting this Conditional Use Permit/Liquor License Exception Permit is approved by the Planning Commission. However, the Director of Planning may approve a Permit Adjustment to extend the validity of this Permit for a period of up to two years. The Permit Adjustment must be approved prior to the expiration of this Permit.
2. **Revocation, Suspension, Modification.** This Conditional Use Permit/Liquor License Exception may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:
 - a. A violation of any conditions of the Conditional Use Permit/Liquor License Exception Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
 - c. The use as presently conducted creates a nuisance.